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612372—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 559

FEDERAL TRADE COMMISSION, PETITIONER

v.

A. E. STALEY MANUFACTURING COMPANY AND STALEY SALES CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General prays that a writ of certiorari be issued to review a decree of the Circuit Court of Appeals for the Seventh Circuit entered in this cause on July 6, 1944, which vacated an order of the Federal Trade Commission requiring the respondents to cease and desist from making certain discriminations in price between purchasers of glucose.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals on the first hearing before it (R. 58) is reported in 135 F. (2d) 453; its opinion on the second hearing (R. 100) is not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on July 6, 1944 (R. 116). The jurisdiction

of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether a seller who adopts the inherently discriminatory price system used by his competitors—sale at delivered prices based on Chicago irrespective of actual place of manufacture and shipment—and thus assures that at no place will his delivered price be below the price of his competitors, can justify this price system under the Clayton Act by maintaining that the low price was made in good faith to meet the equally low price of a competitor, within the meaning of Section 2 (b) of the Act.

(2) Whether discriminatory prices granted by a seller, without inquiry into the facts, upon the verbal statements of buyers that competitors were offering like discriminations, were made "in good faith" to meet a competitor's price within the meaning of Section 2 (b).

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) It shall be unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

The Federal Trade Commission brought this proceeding pursuant to Section 11 of the Clayton Act charging respondents, a manufacturing concern and its wholly owned marketing subsidiary, with violating Section 2 of that act as amended

by the Robinson-Patman Act of June 19, 1936. The case was heard on stipulated facts (R. 36). After the Commission had made findings of fact (R. 36–45) and had entered a cease and desist order (R. 46–48), the court below, on a petition to review the order, held that essential elements of the charge against respondents were not covered by the findings and remanded the case to the Commission for further findings and for a further hearing if necessary (R. 58–61).

The Commission, on remand, made modified findings of fact of which the following are pertinent.

Respondents manufacture corn syrup, commonly called glucose, at their plant at Decatur, Illinois, all shipments being made from Decatur (R. 68, 70). For many years they have sold glucose strictly on a delivered price basis (R. 69). The lowest price quoted has been the price in Chicago and the delivered price in any other place has been the Chicago price plus the freight rate therefrom to destination (*ibid.*). The freight rates from Decatur and those from Chicago to the same destinations differ and some buyers consequently pay imaginary or "phantom" freight costs while other buyers do not pay in full the actual cost of delivery (R. 70, 72). Taking cost of delivery into account, Chicago purchasers of respondents' product have received a price differential over Decatur purchasers of 33½¢ per hundred pounds and they have received a price differential over

purchasers in certain other cities as follows: Kansas City, 27½¢; Dallas, 25½¢; Sioux City, 24¢; St. Louis, 20¢; Shreveport, 18¢ (R. 71–72).

Glucose is widely used in making candy and it represents a major part of the total cost of manufacturing candies having a relatively high glucose content. It is used in greater proportion in candy sold by the manufacturer at a few cents per pound and on a narrow margin of profit. Frequently such candies are unbranded and a price difference of ⅛¢ per pound is sufficient to divert business from one manufacturer to another. As among the candy manufacturers purchasing glucose from respondents, those who buy at prices discriminating in their favor have a substantial competitive advantage over others and this advantage is particularly marked in the case of respondents' Chicago customers. The result is to diminish the ability and the incentive to compete of candy manufacturers located elsewhere and to promote the concentration in Chicago of manufacture of candy of high glucose content. (R. 75–77.)

Respondents' pricing system produces the same kind of discrimination as between different purchasers of their glucose by producers of table syrups. The cost of glucose is an important factor in the cost of such syrups, which are sold upon such a narrow margin of profit that a difference of as little as 1/12¢ per pound can divert trade from one manufacturer to another. (R. 77.)

When respondents first began to make glucose in 1920, other manufacturers were selling at delivered prices and using Chicago as the basing point for computing their delivered prices. After respondents' product came to be recognized in the trade as equal in quality to that of other manufacturers, they adopted the same pricing system used by their competitors and sold glucose at the same delivered price as other manufacturers.[1] They are unable to sell at prices higher than those of other manufacturers. (R. 78–79.)

On various occasions respondents have increased or reduced their glucose prices in all markets by the same amount prior to and independently of any similar increase or reduction by other sellers of glucose. All manufacturers of glucose generally, but not invariably, follow a price advance made by one manufacturer by making a similar advance. (R. 79.)

All manufacturers of glucose permit any purchaser, within a specified time after announcement of a price advance, to place an order, at the superseded price, for delivery within 30 days. Respondents have allowed certain purchasers, primarily those buying in large quantities, to extend the time of delivery far beyond 30 days and have

[1] Among the other manufacturers is a concern with plants at Chicago and Kansas City, Missouri, and five concerns, each with a single plant, located respectively in Clinton, Iowa; Cedar Rapids, Iowa; St. Louis, Mo.; Granite City, Ill.; and Roby, Ind. (R. 69).

allowed purchase at the prior, lower price although the buyer had not actually placed an order within the specified time. By reason of such "booking" practices, respondents have sold to some buyers at lower prices than they were concurrently charging other buyers. Such price discriminations have sometimes been as much as 55¢ per hundred pounds. (R. 73–75.)

Respondents have not shown that the price discriminations resulting from their system of quoting prices and those resulting from their "booking" practices were made in good faith to meet the equally low price of a competitor (R. 87). The effect of both types of discrimination may be substantially to lessen competition and to prevent competition with those receiving the benefit of the discriminations (R. 90–91).

The court below held that there was substantial support for the Commission's findings as to discrimination and as to its effect, but held that the facts showed that the discriminatory prices were made in good faith to meet the equally low price of a competitor and were therefore within the proviso of Section 2 (b) of the act (R. 103–106). Judge Major, concurring, agreed with this conclusion respecting Section 2 (b) but believed that it was unnecessary to pass on this issue because he was of the opinion that Section 2 (a) does not outlaw price differences which are the product of a delivered price, basing-point system of selling

(R. 110–116). Judge Evans, dissenting, was of the opinion that justification under Section 2 (b) had not been established and that the Commission's order should be affirmed (R. 106–110).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In construing Section 2 (b) of the Clayton Act as permitting justification of price discrimination merely by showing that the seller used the same price system as that employed by his competitors at the time the seller began business.

(2) In holding that price discriminations resulting from adopting the practice of competitors of quoting prices upon a basis which assures that the delivered price of all members of the industry will be identical in any given place, are made "in good faith" to meet the equally low price of a competitor within the meaning of Section 2 (b).

(3) In holding that a discrimination in price can be justified under Section 2 (b) merely by showing that competitors were verbally reported to have given or offered a like price discrimination.

(4) In setting aside the order of the Federal Trade Commission.

REASONS FOR GRANTING THE WRIT

1. This case presents a question as to the meaning of Section 2 (b) of the Clayton Act which is of general importance and which has not been, but

should be settled by this Court. This case and *Corn Products Refining Co.* v. *Federal Trade Commission*, which was decided by the court below on the same day and which also involves the validity under Section 2 of the Clayton Act of the delivered price system in effect in the glucose industry, are the first judicial decisions dealing with the application of Section 2, as amended by the Robinson-Patman Act, to sales under a delivered price, basing-point system. It is of grave concern to the Federal Trade Commission in its administration of Section 2, as well as of concern to the members of industry, that the questions raised in this case, which led to three opinions in the court below, should be set at rest by decision in this Court.

Section 2 (b) provides that a seller may justify a price discrimination prohibited by Section 2 (a) by showing that his lower price "was made in good faith to meet an equally low price of a competitor." The court below interpreted the section as permitting justification of price discrimination thereunder by showing that competitors sold under the same price *system*.[2] In the court's view, two facts were sufficient to bring respondents within Section 2 (b). One was that the system of quoting delivered prices based exclusively on Chicago was

[2] See the court's statement (R. 106): "The fact that the companies were first in the field with a price is not controlling. The question here is: Were they first in the field to use the basing-point-pricing system?"

being used by their competitors at the time respondents went into business (R. 104–105). The other was that respondents would have to absorb the freight rate from Decatur to Chicago in order to get into the Chicago market under that system (R. 105). The court, in other words, was of the opinion that if respondents' price in *Chicago,* the lowest price which they quoted, was made to meet the equally low price of a competitor, then its entire system of computing prices and the price discriminations resulting therefrom were granted immunity by Section 2 (b). We submit that this interpretation rests on a misconception of the factors which enter into the price discrimination prohibited by the statute and that the court, by reason of this misconception, erroneously interpreted the statutory requirement of "good faith."

A price discrimination, which consists in giving a lower price to one purchaser than to another, is measured by the difference between the higher and the lower price. In the present case it can be assumed that the respondents' prices in Chicago would have to meet the prices of those competitors who had Chicago plants and who therefore did not have to bear any freight charge in selling to purchasers in that city. But if, as was actually the case, respondents' higher prices in Decatur and elsewhere were not dictated by competitive considerations, then respondents' discrimination in price against non-Chicago purchasers, representing the difference between

respondents' Chicago price and their higher prices elsewhere, resulted from the inclusion of fictitious freight in the latter prices, and only to a small and unascertainable degree from meeting the price of competitors in setting the Chicago price. Respondents' price in Decatur, and their prices in all other places to which the freight rate from Decatur was lower than the rate from the plant of any competitor, were noncompetitive prices. In these markets, in which respondents could sell at a lower delivered cost than could competitors (assuming equal production cost), they declined to quote a delivered price below that which their competitors arrived at by basing their delivered prices on Chicago. Respondents refrained from underselling competitors and chose to forego capture of the markets in which they could sell most advantageously and, instead, adhered to a price system which guaranteed that the delivered prices of all members of the industry would be identical in any given market. When selling in this way, neither respondents' Chicago price nor their prices elsewhere were made "in good faith" to meet the prices of competitors—they were made, not to meet the prices of competitors, but to avoid and foreclose all competition in price among members of the industry.

The effect of the decision below is that if all members of an industry follow the same price system, all except the initiator of the system can bring themselves within Section 2 (b) and may

continue the price discriminations which are the product of an inherently discriminatory pricing system. The command of the statute thus becomes essentially unequal in its application. The decision, coupled with that in the *Corn Products* case, leads to the anomalous result that the Corn Products Company is prohibited from discriminating in price by selling at delivered prices computed on a fictitious basing point, but respondents are free thus to discriminate in price. The courts, in construing other provisions of the antitrust laws, have held that the fact that competitors have engaged in the same practices as those with which the defendant is charged is no defense.[3]

2. We submit that the court below substituted its own appraisal of the evidence and of the inferences to be drawn therefrom, in conflict with applicable decisions of this Court.

One of the stipulated facts was that respondents on several occasions increased their price in all markets "without and independent of any similar and prior action by competitors" (R. 29–30). The court below, in holding that this evidence did not support the Commission's finding that respondents' discriminatory prices were not made

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[3] *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910, 912 (C. C. A. 2), certiorari denied, 267 U. S. 602 (Clayton Act, Sec. 3); *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 308–309, 312–313 (Federal Trade Commission Act, Sec. 5); *United States Telephone Co.* v. *Central Union Telephone Co.*, 202 Fed. 66, 74–75 (C. C. A. 6), certiorari denied, 229 U. S. 620 (Sherman Act). Cf. *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 599.

to meet competitors' prices, made the following factual inferences for which there was no direct supporting proof (R. 105–106):

> The companies [respondents] may very well have known what the competitive situation in their industry was and what was certain to happen. In anticipation of what their competitors were certain to do, the companies promulgated prices to meet the foreseen competitive situation.

We submit that the court thus departed from the rules laid down by this Court with reference to judicial review of orders of the Federal Trade Commission. In such a proceeding a court is forbidden "to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences" (*Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73) and, when the facts have been stipulated, "The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission" (*Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63). While these decisions related to orders issued under Section 5 of the Federal Trade Commission Act, the rule is necessarily the same as to orders under Section 2 of the Clayton Act. Section 11 of the Act, which governs review of orders under Section 2, provides, like Section 5 of the Trade Commission Act, that findings of the Commission

which are supported by testimony shall be "conclusive."

3. We also submit that the court below erred in holding that respondents had established justification under Section 2 (b) of the price discriminations granted in connection with the industry's "booking" practices (see *supra*, pp. 6–7). The only evidence relating to competitors was that buyers had made verbal statements, not otherwise supported, as to the action or contemplated action of competitors and that respondents believed the statements to be true (R. 28–29). The decision raises the question whether a discriminatory price granted on the basis of a verbal statement by an interested party, and without inquiry into its accuracy, constitutes a price made in "good faith" to "meet" a competitor's price within the meaning of the statute. The interpretation which the court placed upon Section 2 (b) is not confined to justification of price discriminations of the particular kind here involved. The question of the meaning of the statute, being of general application, merits review by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1944.

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